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The Domain Name Registration System

Liberalization, consumer protection and growth

Jenny Ng



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The Domain Name Registration System

This book offers a comparative analysis of the domain name registration systems in use in Australia and the United Kingdom. Taking an international perspective, Jenny Ng analyzes the global trends and dynamics of the domain name registration systems and explores the advantages and disadvantages of restrictive and less restrictive systems by addressing issues of consumer protection and the promotion of growth in the number of domain name registrations. *The Domain Name Registration System* examines the regulatory frameworks in the restrictive and unrestrictive registration systems and considers recent developments in this area. Jenny Ng also examines the legal and economic implications of these regulatory frameworks, drawing upon economic theory, regulatory and systems theory as well as applying rigorous legal analysis. In doing so, this work proposes ways in which such systems could be better designed to reflect the needs of the specific circumstances in individual jurisdictions. This book will be of particular interest to academics and students of IT law and e-commerce.

Jenny Ng has taught both Australian Law and English Law in several countries. She specializes in Intellectual Property Law, Information Technology Law and e-Commerce Law. Her doctoral research in domain names has won a research paper prize in a leading Australian University and an Australian grant. Jenny Ng is also an Australian lawyer who has been admitted in the Supreme Court of New South Wales.

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The Domain Name Registration System

Liberalization, Consumer Protection and Growth

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In loving memory of my grandparents.

Preface

My interest in domain names began more than 10 years ago when I was working at an overseas top-tier law firm and wrote articles on cybersquatting issues for the law firm. Thus, when I decided to write a doctoral thesis, I wrote about domain names. The focus of this research is on the legal and economic implications of the domain name registration system in relation to commercial domain names. Most domain name industries place the issue of 'growth' as one of their priorities. Their other priorities include preventing abusive registrations, so I decided to undertake research on the relationship between these priorities. I first mooted the idea that there *is* a connection between consumer protection, growth in the number of domain name registrations and the trend of the liberalization of domain name registration systems in the University of Queensland's Postgraduate Research Colloquium. The idea was well received and won the Best Research Paper Prize. Thereafter, I won the auDA Foundation Grant.

This monograph is a combination of my doctoral and postdoctoral research. It is largely based on my doctoral thesis which I finished writing in 25 September 2009, and which was later adapted and updated for the purposes of this monograph. It explains the trend in domain name registrations worldwide where there is liberalization in the registration principles and rules to remain competitive and promote growth. This poses an interesting issue as the more liberal or unrestrictive registration systems are known to be more susceptible to cybersquatting problems and may face challenges in promoting the ideals of consumer protection. The book describes this issue as a *tug and pull* relationship. This research illustrates that many countries have liberalized their registration systems and have continued to promote consumer protection by dealing with issues such as abusive registrations and competing legitimate interests very efficiently.

The significance of the research stems from the commercialization of the Internet and the fact that domain names are now known as commercially valuable Internet identifiers. It explores the advantages and disadvantages of the restrictive registration system and less restrictive registration system by addressing the issues of consumer protection and promoting growth in the number of domain name registrations. It provides a survey of the evolution

and change in the domain name registration system. It also provides a comparative analysis between the Australian domain name registration system and the United Kingdom's registration system. It analyzes the global trends and international perspectives of domain name registration systems, the different circumstances in the restrictive and less restrictive registration systems, and the dynamics in the domain name system. It highlights the importance of the needs of the Internet users and the different policies and circumstances in a specific country in realizing the goal of liberalization, consumer protection and growth within a domain name registration system.

This research will have relevance for other countries in considering how best to design their domain name systems. It is also suitable as a reference book for university students. This research provides a broad coverage of issues and concepts such as the liberalization of registration rules, consumer protection, growth of domain name registrations, the *ex ante* system, the *ex post* system, preventive mechanisms, curative mechanisms and the different types of registration system.

Learning lessons from other countries is a good way of designing a good domain name registration system and the comparative analysis in this book provides valuable lessons that we could learn from two leading domain name systems in the world, namely the Australian domain name registration system and the United Kingdom's domain name registration system. It is hoped that there will be more literature in the future which provides a comparative analysis of the domain name registration systems of different countries which have very good domain name systems as well because there are many answers to domain name issues which can be explored when such a comparative analysis is made. This monograph is current to 31 December 2011.

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This research has been made possible with the support of many people. I would like to thank the people who have been supportive of both my doctoral and post-doctoral journeys as this book is an accumulation of both my doctoral and postdoctoral research. I would like to thank the supervisors of my doctoral thesis in the Law Faculty of Queensland University of Technology (QUT), Professor Anne Fitzgerald (Principal Supervisor) and Professor Brian Fitzgerald (Associate Supervisor) for their guidance and support. I also acknowledge the contribution of the members of the panels convened for my Confirmation of Candidature and Final seminar presentations at QUT, Peter Coroneos, Dr Dimitrios Eliades and Neale Hooper. I would also like to thank Jane Malady, Lois McLaughlin, Britt Separovich and the staff of QUT's Law and Justice Research Centre, Research Students Centre and Library Services. Professor Rod Wissler, QUT's Dean of Research and Research Training is thanked for approving a waiver of fees during the period when the final version of the dissertation was being prepared.

I am appreciative of the support of the auDA Foundation which awarded me with an auDA Foundation Grant and supplementary funding which made it possible for me to work on this thesis and funded a substantial proportion of my tuition fees at QUT. Many thanks also to Elspeth Ross with whom it has been a pleasure to liaise with on matters relating to the grant and funding of my thesis. I would also like to thank my grant supporters, Adrian Kinderis of AusRegistry and Dr David Plater of University of South Australia. I am also grateful to my aunt and uncle, Dr Ng Huang Lean and Dr Ooi Tean Soon for helping fund the final semester of the doctoral degree so that I am not left to shoulder the whole financial burden on my own.

I would like to thank several organizations and individuals who have responded to my research enquiries, notably auDA, Nominet, Verisign, the World Intellectual Property Organization (WIPO), the Commonwealth Scientific and Industrial Research Organization (CSIRO), Professor Michael Geist (University of Ottawa), John Selby (Macquarie University) and Brendan Lewis.

On a personal note, I extend my thanks to my family, especially my grandmother, mother and aunt, who have provided me with encouragement and support; and have been in close contact with the progress of the doctoral

research every step of the way. My friend, Kylie Pappalardo, is thanked for her supportiveness and for attending every one of my domain name seminars when I was a doctoral candidate, even though her main area of research is actually Copyright Law! I would like to thank Professor Suri Ratnapala (University of Queensland), Professor Duncan Bentley (Victoria University) and Professor Bee Chen Goh (Southern Cross University) for the support that they have shown. I would also like to thank two very good friends, Mary Lim and Damien Lepage, who have always been helpful and supportive and provided for some good times at the Gold Coast which kept me in touch with the lighter side of things – despite the many hours spent every day on a very serious piece of research.

Professor Rosalind Mason (Head of School of QUT), Professor Bill Duncan (Assistant Dean of QUT, Research), Professor Des Butler, Associate Professor Ben White and Dr Kelley Burton came into the picture in the postdoctoral stage of my research career. Ros was one of my favorite bosses who always believed in me and was very supportive of this monograph, whilst Bill was always a pleasure to chat with on research matters. Des contributed in making me a very good academic who teaches well. I admired his research capabilities very much as he has written several monographs in his career and it provided me with much inspiration when I am writing my own monograph. Ben planted the idea that I should publish my thesis as a monograph when my doctorate was conferred and was very encouraging about it. Kelley is a good friend who introduced me to the world of publishing books and provided helpful advice about writing book proposals. I am grateful for their contributions and support. Many thanks also to my former student and research assistant, Nicole Youngberry, who has been helpful with assisting me with the endnotes and bibliography of this monograph.

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I am grateful for the endless support provided by my family and friends. Whilst this is a research area that I am passionate about, this research project would not have been as enjoyable if I hadn't had the support of my family and friends, as well as the support of a few other people whom I've either worked with or have met along the way, in the course of both my doctoral and post-doctoral journeys.

My grandmother was the biggest supporter of my doctoral research who lived to see me finish writing my thesis but passed away peacefully soon after. *I dedicate this monograph in loving memory of my grandparents.*

Jenny Ng

List of abbreviations

ABN	Australian Business Number
ABR	Australian Business Register
ACCC	Australian Competition and Consumer Commission
ACIP	Australian Advisory Council on Intellectual Property
ACMA	Australian Communications and Media Authority
ACPA	Anti-Cybersquatting Consumer Protection Act 1999
ADNA	.au Domain Administration Ltd
ADR	alternative dispute resolution
ARDS	Alternative Domain Name Dispute Resolution in Slovenia
ARNES	Academic and Research Network of Slovenia
ASIC	Australian Securities and Investments Commission
auDA	.au Domain Administrator Ltd
auDRP	.au Dispute Resolution Policy
ccTLD	Country Code Top-Level Domain
CSIRO	Commonwealth Scientific and Research Organization
DCITA	Department of Communications, Information Technology and the Arts
DNS	Domain Name System
DNSSEC	Domain Name System Security Extensions
DoS	Denial of Service
DRS	Dispute Resolution Service
EU	European Union
FICORA	Finnish Communications Regulatory Authority
FTDA	Federal Trademark Dilution Act
GAC	Government Advisory Committee
gTLD	Generic Top-Level Domain
IANA	Internet Assigned Number Authority
ICANN	Internet Corporation for Assigned Names and Numbers
IDN	Internationalized Domain Names
IEDR	.ie Domain Registry
IIS	Internet Infrastructure in Sweden
INTA	International Trademark Association
ISOC-AU	Internet Society of Australia

NOIE	National Office of the Information Economy
OECD	Organisation for Economic Co-operation and Development
Ofcom	Office of Communication
PTS	Swedish Post and Telecom Agency
RDNH	Reversed Domain Name Hijacking
SLD/2LD	second-level domain
TLD	top-level domain
UDRP	Uniform Dispute Resolution Policy
URL	Uniform Resource Locator
usDRP	usTLD Dispute Resolution Policy
USTLD	United States Top Level Domain
WIPO	World Intellectual Property Organization

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Part I

The domain name registration system

Overview and international perspectives



1 Liberalization, consumer protection and growth

The tug and pull relationship in the domain name registration system

The idea of the liberalization of the rules within the domain name registration system is one which is rather appealing to many countries. However, it is also one which is to be considered with caution as less restrictive rules may result in an increase in domain name disputes.

A restrictive registration system requires certain requirements to be satisfied, such as proving one's eligibility to register the domain name, before it can be registered. An unrestrictive registration system has minimal eligibility requirements. While restrictive registration conditions may lead to fewer domain name disputes, they result in a considerably smaller number of domain name registrations.¹ Since 2003, there has been a distinct trend of countries transitioning from restrictive registration systems to less restrictive ones. There are several reasons for this trend. An important factor contributing to the liberalization of the registration system in many countries has been the desire to make it easier for registrants to register domain names in that country's domain space,² thereby increasing the number of names registered in that country code domain.³

There is a 'tug and pull' relationship between the seemingly opposing objectives of, on the one hand, liberalizing the registration rules to promote growth in domain name registrations and, on the other hand, ensuring that the interests of consumers and businesses are adequately protected. Restrictive registration principles have been seen as best serving the objective of consumer protection while less restrictive registration principles have been seen as most effective in increasing the number of domain names registered in a country code domain space.

Historically, the imposition of restrictions on who could register a domain name and what they could register was seen as a way of minimizing the problems caused by abusive domain name registrations involving practices such as cybersquatting, which is when someone registers or uses a domain name with the bad intention of profiting from the goodwill of a well known name belonging to another user, and typosquatting, which is the practice of URL hijacking that occurs when a user makes a mistake when typing in a web address into a web browser. The interests of consumers and businesses were considered to be better protected by the imposition of restrictions on

registration.⁴ However, now that many countries have taken a more liberal stance and adopted less restrictive registration principles, it begs the question of whether the objective of consumer protection can be more effectively pursued by other means.

In countries where registration principles have been liberalized, the ideal of consumer protection has not been ignored or overlooked. Experience has shown that consumer interests can be effectively protected in systems based on less restrictive registration principles. Countries that have liberalized their registration systems have implemented other mechanisms to ensure that the level of abusive registrations is minimized. In many countries, liberalization of the registration system has been accompanied by a strengthening of the arbitration system to ensure that the domain name registration system continues to offer adequate protection for consumers. The effectiveness of measures implemented in countries that have adopted unrestrictive registration systems is indicated by the fact that countries such as the United Kingdom, which has an unrestrictive system, has been found to promote consumer protection⁵ and has a domain space which is trusted by its users.⁶

Liberalization of the domain name registration rules

The liberalization of the domain name registration rules and principles can occur in two principal ways. First, the rules within the registration system can be liberalized by relaxing a few restrictions or making eligibility criteria less restrictive, without fully migrating from a restrictive to an unrestrictive model. This kind of liberalization can be observed in the Australian domain name registration system. Although still characterized as restrictive, the Australian domain name registration system has undergone some relaxation in the past few years, with a view to the commercial realities. A good example is the relaxation of the transfer rules that now allow the resale of domain names,⁷ whereas previously the sale of domain names was strictly prohibited.

Overall, the Australian restrictive system can be seen as one which has embraced the concept of liberalization for a long time, albeit in a slow and careful manner, and it continues to do so. It is not overly restrictive, and this is manifested in the auDA Review's Final Report where it discussed the 'close and substantial' connection rule and stated: 'The consensus view of the Panel is against an "open slather" approach to domain name registrations in .au. Equally, the Panel does not support the proposition that the policy rules should be made more restrictive.'⁸

Restrictions are imposed where needed. For example, the rule against misspellings which prevents one from registering misspellings acts as a safeguard against abusing the registration rules in the practice of domain name monetization. By the same token, restrictions are not imposed where they are not needed. For example, Australia does not impose a rule against domain name tasting as the problem of domain name tasting does not occur in Australia.

Second, liberalization may occur by migrating from one kind of registration system to another, such as Sweden's migration from a restrictive to an unrestricted system in 2003. Achieving an increase in the number of domain names registered in a particular domain space, particularly in a country code domain, is important as it maintains the stability of the domain name industry. Lack of growth in the industry may affect certain key players within the domain name industry such as the registrars who provide their services to the registrants. A reduction in growth will affect their ability to bear the costs involved in providing the high level of services that they currently provide.

In many countries, domain name registration systems have been liberalized because, under their old restrictive systems, growth of the system was stunted.⁹ Thus, these countries have liberalized their registration systems to promote growth in the number of domain name registrations and to make it easier for the end users to register their domain names.¹⁰

'Growth' vs 'consumer protection'

The type of registration system that each country adopts is dependent on its own set of circumstances and priorities. Consumer protection is a priority in many countries. This is not surprising as abusive registrations such as typosquatting and cybersquatting are problems which cannot be ignored. Thus, in countries that have liberalized their registration systems, it is a matter of finding ways to balance the different priorities within the country's domain name registration system. In particular, finding the right balance in the 'tug and pull' relationship between consumer protection and promoting competition and growth in domain name registrations – two important but different priorities – is a challenge for every country. Liberalization of the registration system may promote growth but it risks sacrificing the ideal of consumer protection if there are not enough safeguards. A proper balance needs to be struck to ensure that consumer protection is not sacrificed or adversely affected by the liberalization of the registration system.

The first few countries to liberate: the Swedish experience

The Swedish system was initially a restrictive registration system which had a geographic restriction and a limitation on the number of domains per applicant. Furthermore, the registration of the domain name could only be made after a pre-screening process.¹¹ The registrants had to meet the eligibility criteria, for example, the domain name had to reflect the name of the applicant.

This registration system was not popular with the registrants as they found it to be too restrictive. As a consequence, the number of registrations dropped as potential registrants switched to Generic Top-Level Domains (gTLDs) or the open Country Code Top-Level Domains (ccTLDs) of a coral island in the Asia Pacific called Niue. Niue's .nu ccTLD was popular among the Swedish registrants as it was unrestricted and was a catchy vanity domain name for